RECORD AND BRIEF

Supreme Court, U.S.
FILED
DEC 21 2016
OFFICE OF THE CLERK

No. 15-1500

IN THE

Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE OTOE-MISSOURIA TRIBE OF INDIANS, THE LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, THE MECHOOPDA INDIAN TRIBE OF CHICO RANCHERIA, AND THE BIG VALLEY BAND OF POMO INDIANS OF THE BIG VALLEY RANCHERIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

RICHARD VERRI
Counsel of Record
BRETT STAVIN
SABA BAZZAZIEH
ROSETTE, LLP
1100 H. STREET, NW
SUITE 400
WASHINGTON, DC 20005
(202) 652-0579
rverri@rosettelaw.com

Counsel for Amici Curiae

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Issues of federal Indian law, including tribal immunity, are within the exclusive domain of Congress 4

II. Congress is committed to a policy of encouraging tribal self-determination 17

III. Suits against tribal employees for actions taken in their official capacity—which are not authorized by Congress—undermine the congressional policy of encouraging tribal self-determination, and should not be permitted 22

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Barr v. Matteo, 360 U.S. 564 (1959)..... 23, 31, 32, 33

Bryan v. Itasca County, 426 U.S. 373 (1976)..... 21

Chisholm v. Georgia, 2 U.S. 419 (1793) 33

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) 20

Ex parte Crow Dog, 109 U.S. 556 (1883)..... 7

Edelman v. Jordan, 415 U.S. 651 (1974)..... 23

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995)..... 33

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Incorporated, 523 U.S. 751 (1998)..... 15, 16

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 4, 9

Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014)..... 27, 30, 34

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)..... 10, 11, 12, 15

National Federation of Independent Businesses v. Sebelius, 132 S. Ct. 2566 (2012)..... 6

Nebraska v. Parker, 136 S. Ct. 1072 (2016)..... 13

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).. 29

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 33

South Carolina v. Catawba Indian Tribe, 476 U.S. 498 (1986)..... 20

United States v. Gorman, 165 U.S. 316 (1897) 29
United States v. Kagama, 118 U.S. 375 (1886) . 7, 8, 9
United States v. Lara, 541 U.S. 193 (2004) 4
United States v. Lopez, 514 U.S. 549 (1995) 5
United States v. Morrison, 529 U.S. 598 (2000) 5
Warren Trading Post Company v. Ariz. State Tax Commission, 380 U.S. 685 (1965) 6
Westfall v. Erwin, 484 U.S. 292 (1988) 32, 33
Wickard v. Filburn, 317 U.S. 111 (1942) 5
Worcester v. Georgia, 31 U.S. 515 (1832) 18
Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992) 19

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Art. I, § 8, cl.3 5
Mohegan Const., Art. XIII, § 1 24
25 U.S.C. § 71 19
25 U.S.C. § 81 ..... 29, 30
25 U.S.C. § 461 *et seq.* 20
25 U.S.C. § 1302 29
25 U.S.C. § 2701(4) 26
25 U.S.C. § 2710(d)(1)(C) 25
25 U.S.C. § 2710(d)(7)(A)(ii) 16, 30
25 U.S.C. § 3601(6) 22

25 U.S.C. § 5332(1) 28

Indian Self-Determination and Education Assistance Act of 1975 21

Pub. L. 100-694 (1988) (Westfall Act) 32, 33

23 Stat. 385, § 9 7

26 Stat. 851-54 (1891) 28

Mohegan Tribal Code § 3-131 25

Mohegan Tribal Code, § 3-248(a) 24

OTHER AUTHORITIES

1837 Treaty of Fort Snelling 10

Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012 (2015) 4

Jack Balkin, *Commerce*, 109 Mich. L. Rev. 1 (2010) 6

Robert N. Clinton *et al.*, American Indian Law (5th ed. 2007) 17, 18, 21

Cohen's Handbook of Federal Indian Law (2012) 17

Larry Echohawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 Idaho L. Rev. 623 (2004) 21

Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984) 8

Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661 (2002) 27, 31

Tribal–State Compact, § 3(g), *available at* https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026002.pdf 24-25

INTEREST OF *AMICI CURIAE*[1]

Amici are four federally recognized Indian tribes: the Otoe–Missouria Tribe of Indians, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Mechoopda Indian Tribe of Chico Rancheria, and the Big Valley Band of Pomo Indians of the Big Valley Rancheria. Each tribe exercises powers of self-governance consistent with the United States' longstanding policy of encouraging tribal self-determination. Each operates a sophisticated government, with numerous branches and departments carrying out a wide array of traditional government duties, such as law enforcement, economic development, education, health care, and more. The effectiveness of these governmental operations depends on the tribes' ability to attract and retain well-trained and skilled employees. These tribes thus have a direct and significant interest in ensuring that tribal government employees are able to perform their essential job functions without fear of being subject to personal liability.

---

[1] All parties to this litigation have consented to this *amici curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is a well-established tenet of federal Indian law that Congress has plenary authority to legislate over Indian affairs. It is a power that is not defined solely by the Indian Commerce Clause, as Congress has the ability to enact Indian-related legislation that has nothing to do with commerce whatsoever. This extra-constitutional legislative power springs from the trust relationship between tribes and the federal government, pursuant to which tribes are considered "wards of the nation," with the United States as their "trustee."

For over two hundred years, Congress has exercised this plenary power to dictate federal Indian policy. The operative policy has morphed throughout the years, quite dramatically. At one time, Congress encouraged total assimilation of Indians into non-Indian society; at other times, Congress encouraged termination of tribes altogether. Those policies are in the past. Since at least 1970, the congressionally mandated federal Indian policy is one of supporting tribal self-determination, including through economic development ventures such as gaming, as well as through the use of tribal dispute resolution processes.

Petitioners' suit would severely undermine Congress's commitment to furthering tribal self-determination. The facts underlying this case straightforwardly display how the Mohegan Tribe has exercised its sovereignty in a thoughtful, deliberate manner. The Tribe established the

Mohegan Sun Casino ("Casino") in an effort to generate revenues to support essential governmental functions, including social services for tribal members—a goal encouraged by Congress when it enacted the Indian Gaming Regulatory Act ("IGRA"). Pursuant to tribal and applicable federal law, the Casino is governed by an independent tribal regulatory agency, the Mohegan Tribal Gaming Authority. And per an intergovernmental agreement with the State of Connecticut, disputes arising from the conduct of Casino employees acting in their official capacity are to be heard by the Mohegan Gaming Disputes Court, a judicial body created specifically to adjudicate such disputes, which operates pursuant to laws similar to the State of Connecticut.

Indeed, the creation of the Casino for tribal economic development, the regulation of the Casino under tribal law, the adjudication of gaming-related disputes by a tribal judicial body, and the government-to-government negotiations with the State of Connecticut, all highlight the Tribe's efforts to achieve self-determination. Petitioners' suit threatens to undermine all of it. Because it is a lawsuit that Congress has not authorized in any manner, it should be rejected.

Rejecting Petitioners' invitation to diminish the existing scope of tribal immunity would cohere with the foundational doctrinal underpinnings of federal Indian law. Specifically, the Court should abide by the central tenet of federal Indian law that tribal sovereignty—including the doctrine of tribal immunity—should not be diminished unless

Congress expressly says so. Here, it is uncontested that Congress has not specifically authorized the type of lawsuit filed by Petitioners.

Whether viewed as an issue of "sovereign" immunity or "official" immunity, the outcome in this case should be the same. Both forms of immunity are a matter of federal law and can only be diminished by Congress acting pursuant to its plenary power over Indian affairs. Because Congress has not acted to diminish either form of immunity, Petitioners' suit is barred, and the Court should affirm.

ARGUMENT

I. Issues of federal Indian law, including tribal immunity, are within the exclusive domain of Congress.

Congress has long possessed what is described as "plenary" power over Indian affairs. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). It is "plenary" in the sense that Congress's authority over Indian affairs is not restricted to any specific subject area. It is also "exclusive" in that state and local governments lack any comparable authority to regulate Indian affairs (of course, unless that authority is explicitly delegated to them by Congress). Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1014 (2015). This plenary power doctrine occupies a central role in the development of federal Indian law.

A. By virtue of the Indian Commerce Clause and the federal–tribal trust relationship, Congress enjoys plenary power over Indian affairs.

Congressional power over Indian affairs is foremost derived from the Commerce Clause, which explicitly grants Congress the authority "to regulate commerce . . . with the Indian tribes." U.S. Const., Art. I, § 8, cl.3. The Commerce Clause is one of only three references to Indians in the Constitution (and one of only two at the time of ratification),[2] and it is the sole provision that has proven to be constitutionally significant.

In the non-Indian context, it is well-established that Congress's powers under the Commerce Clause are "subject to outer limits." *United States v. Lopez*, 514 U.S. 549, 557 (1995). Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," or "activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 608–09 (2000). This power is broad, to be sure, particularly with respect to the third category of permissible regulation—activities that "substantially affect" interstate commerce. *E.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding federal statute restricting the production and consumption of homegrown wheat). But there are

---

[2] At the time of ratification, the only other mention of Indians was contained in the Article I, § 2 Census Clause (regarding apportionment); in 1868 the Fourteenth Amendment added a similar apportionment clause referencing Indians.

still limits. As stated in *National Federation of Independent Businesses v. Sebelius*, the Interstate Commerce Clause does not vest Congress with a general "police power." 132 S. Ct. 2566, 2578 (2012). Accordingly, "many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few"—lie beyond the reach of federal regulation under the Interstate Commerce Clause. *Id.*

The earliest federal legislation regarding Indian affairs—the Trade and Intercourse Acts—might be interpreted as reflecting a similar understanding of the *Indian* Commerce Clause. By and large, those Acts were tethered to what would unquestionably be considered commercial activity. Essentially, the Acts restricted the alienation of Indian land and regulated trade between Indians and non-Indians. *See Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 688–90 (1965) (discussing the development of the Trade and Intercourse Acts).

Yet, although the Trade and Intercourse Acts were for the most part focused on commercial issues, the presence of certain criminal provisions in the Acts provided evidence that Congress intended to exercise a much broader control over Indian affairs. Jack Balkin, *Commerce*, 109 Mich. L. Rev. 1, 24–25 (2010) ("Congress clearly believed that it could reach both economic and noneconomic activity; at the very least it believed that it could regulate noneconomic activity in order to protect trade and diplomatic relations that would further trade."). Plainly, even

in the earliest era of federal Indian policy, Congress began to prod the notion of plenary power.

Indeed, Congress soon began to legislate on non-commercial issues affecting Indian country. One emblematic foray into purely intratribal and non-commercial activity was in response to the Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), which held that federal courts lacked jurisdiction over a criminal prosecution brought against a Sioux tribal member for the on-reservation murder of a fellow Sioux. Congress reacted to *Crow Dog* by passing the Major Crimes Act, which provides for federal criminal jurisdiction over certain crimes committed by Indians in Indian country, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. Act of March 3, 1885, 23 Stat. 385, § 9. The Major Crimes Act almost immediately came under constitutional scrutiny in *United States v. Kagama*, 118 U.S. 375 (1886), a case that involved two Indians of the Hoopa Valley Tribe indicted in federal court for the murder of a fellow Hoopa Valley member. They challenged their indictment on the theory that Congress lacked constitutional authority to pass the Major Crimes Act.

The Court found that the law could not be sustained on the basis of Congress's powers under the Indian Commerce Clause, for the law had no connection to commerce. As the Court explained:

> [I]t would be a very strained construction of [the Indian Commerce Clause] that a system of criminal laws

> for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

Id. at 378–79. Nor did any other constitutional provision apply. The Property or Territorial Clause of Article IV was inapplicable because the alleged crime took place on a reservation within the State of California. Likewise, the congressional power to effectuate Indian treaties was also found to be irrelevant, as no treaty was involved. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 213–14 (1984).

Nonetheless, the Court sustained the law, finding that Congress had the requisite power under a federal trusteeship theory. The Court placed great weight on the trust relationship between tribes and the federal government, pursuant to which Indian tribes are considered "wards of the nation, . . . dependent on the United States." *Kagama*, 118 U.S. at 383. The Court also described the trust relationship as one in which the United States protects tribes against hostile state governments:

> [The tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 384. Consequently, the trust relationship became a source of Congress's plenary power over tribes.

At the time *Kagama* was decided, it might well have been thought that the trust relationship as a source of legislative power only authorized laws that effectuated the United States' "duty of protection." This turned out not to be the case, as seventeen years later, in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court held that Congress's "plenary power" included the power to unilaterally abrogate Indian treaties. Thus, despite *Kagama*'s emphasis on the "duty of protection," the plenary power doctrine was expanded to authorize congressional actions that are clearly detrimental to tribal interests.

The upshot of this jurisprudence is that the doctrine of enumerated powers does nothing to restrict congressional action in the field of Indian affairs. Though the traditional understanding of

constitutional law is that congressional action must be authorized in the constitutional text itself—*e.g.*, through one or more of the enumerated powers in Article I—the same is simply not true with regard to legislation aimed at Indian tribes.

B. The plenary power doctrine plays a central role in Indian law jurisprudence, counseling against judicial diminishment of tribal sovereignty.

In light of Congress's plenary power over Indian affairs, the Court has made it clear that it will not infer a diminishment of tribal sovereignty absent clear and unmistakable evidence of congressional intent to that effect. This principle applies across the spectrum of Indian law cases, including to cases involving, *inter alia*, treaty-rights, land disputes, and immunity from suit.

1. Treaty Rights

The treaty-rights case of *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), illustrates the general principle. At issue in that case was whether the Mille Lacs Band retained hunting, fishing, and gathering rights on ceded land—rights guaranteed in an 1837 Treaty of Fort Snelling. Article V of the 1837 Treaty provided that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [*sic*] to the Indians, during the pleasure of the President of the United States." *Id.* at 177. The State of Minnesota argued that these usufructuary rights were lost by three independent actions: (1) an

Executive Order in 1850 issued by President Taylor; (2) an 1855 Treaty; and (3) the admission of Minnesota into the Union in 1858.

The Court first addressed the 1850 Executive Order. On its face, the Executive Order clearly purported to (A) remove the Chippewa from the ceded lands, and (B) terminate their usufructuary rights.[3] Nonetheless, the Court held that the Executive Order could not have terminated these rights because President Taylor had no authority (by statute, treaty, or otherwise) to order removal of the Chippewa, and the invalid removal order was not severable from portion of the Executive Order purporting to terminate the usufructuary rights. *Id.* at 189–93.

---

[3] Specifically, the Executive Order provided:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th 1842, of hunting on the territory which they ceded by that treaty, 'with the other usual privileges of occupancy until required to remove by the President of the United States,' are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

Mille Lacs Band, 526 U.S. at 179.

Second, the Court held that the 1855 Treaty between the United States and the Chippewa likewise did not terminate the usufructuary rights. That treaty, the Court explained, "was designed primarily to transfer Chippewa land to the United States." *Id.* at 196. The State had relied on a sentence in the treaty providing that "[t]he said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." But the Court interpreted this sentence in light of historical context, which furnished no proof of any intent other than to transfer the land. The 1855 Treaty made no mention of usufructuary rights whatsoever, and the Court held that it could not have been properly understood by the tribes to terminate those rights. *See id.* at 195–200.

Finally, the Court held that Minnesota's entry into the Union did not terminate the Chippewa's usufructuary rights. In so holding, the Court recognized that "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Id.* at 202. The relevant statute, Minnesota's enabling Act, did not meet this standard. The Act made no mention of Indian treaty rights whatsoever, and the Court refused to apply the "equal footing doctrine" in such a way as to unnecessarily impair tribal sovereignty. *Id.* at 207 (citation omitted) ("Treaty rights are not impliedly terminated upon statehood.").

In short, though various sources of law could have been at least conceivably interpreted as terminating the Chippewa's usufructuary rights, the Court refused to draw such inferences. Instead, the Court required a clear and unequivocal termination of those treaty rights. Because such a clear and unequivocal statement could not be found anywhere in the record, the Court held that the Chippewa's treaty rights were retained.

2. Reservation Boundaries

The Court's reservation-diminishment cases trace a similar path. Just last term, for instance, in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), the Court held that an 1882 Act of Congress empowering the Secretary of the Interior to sell certain tribal lands to the west of a railroad right-of-way did not diminish the Omaha Indian Reservation.

The 1882 Act authorized the Secretary "to cause to be surveyed, if necessary, and sold" over 50,000 acres of reservation land lying west of the right-of-way. The Secretary was to appraise the land in forty-acre tracts and thereafter proclaim that the lands were "open for settlement." Nonmembers of the Tribe would be permitted to purchase 160-acre tracts of land for cash, which would be "placed to the credit of said Indians in the Treasury of the United States." The Act also allowed for allotments to be issued to tribal members, although only ten to fifteen allotments west of the right-of-way were ultimately issued. The remaining 50,157 acres were opened for settlement by nonmembers of the Tribe. *Id.* at 1077.

The land west of the right-of-way became the Village of Pender, and it is almost entirely occupied by non-members. In fact, "[l]ess than 2% of Omaha tribal members have lived west of the right-of-way since the early 20th century." *Id.* at 1078. This prolonged absence notwithstanding, the Tribe eventually asserted regulatory jurisdiction in 2006, requiring the Court to determine whether the 1882 Act diminished the reservation.

To diminish a reservation of its land base, the Court noted, congressional intent "must be clear." Accordingly, the Court found that it must look for "unequivocal evidence" as to whether Congress intended the 1882 Act to diminish the Omaha Indian Reservation. *Id.* at 1078–79.

The 1882 Act did not meet this standard. For starters, by its plain text, the Act did not provide for "a fixed sum for all of the disputed lands"—a statutory feature that would have strongly implied diminishment. Rather, the Act simply "opened" the reservation to allow non-Indians to buy tracts of land within the existing reservation boundaries. *Id.* at 1079–80. The legislative history and record of negotiations likewise failed to provide "clear and plain" or "unambiguous" evidence of intent to diminish the reservation. *Id.* at 1080–81.

The Court acknowledged that the Tribe has been "almost entirely absent from the disputed territory for more than 120 years" and noted that this subsequent demographic history could serve as a "clue" as to Congress's intent. However, the Court deemed subsequent demographic history, in and of

itself, insufficient to draw an inference of congressional intent to diminish the reservation. *Id.* at 1081–82. So, as in the *Mille Lacs* treaty-rights case, in deference to Congress's plenary power in Indian affairs, the Court refused to unnecessarily infer a diminishment of tribal sovereignty.

3. Immunity from Suit

The same deference to Congress evidenced in the above-described cases likewise applies to the issue of immunity from suit. The case of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), is instructive. In that case, the Kiowa Tribe defaulted on a promissory note that it had entered into with a non-tribal business entity and which was executed and delivered off tribal land. The non-tribal business (Manufacturing Technologies) sued the Tribe in Oklahoma State Court. The Tribe claimed sovereign immunity, a defense that was rejected by the Oklahoma Court of Appeals on the theory that immunity should not apply to off-reservation commercial activity. The U.S. Supreme Court granted certiorari[4] and reversed. *Id.* at 753–54.

The Court began by explaining that tribal immunity is a rule of *federal* law and thus not subject to diminution by the states. *Id.* at 754–55. Though the plaintiff had questioned the scope—and the very legitimacy—of tribal immunity, the Court

---

[4] The Oklahoma Supreme Court declined review, so the case went directly from the Oklahoma Court of Appeals to the U.S. Supreme Court. *Kiowa*, 523 U.S. at 754.

rejected the invitation to narrow the doctrine. Instead, the Court chose to "defer to the role Congress may wish to exercise in this important judgment." *Id.* at 758.

As in the treaty-rights and reservation boundaries cases, the plenary power doctrine was central to the Court's analysis. It was not lost on the Court that Congress had previously taken legislative actions to adjust the limits of tribal immunity. For example, in the IGRA, Congress expressly abrogated tribal immunity for actions brought by a state or tribe to enjoin on-reservation gaming activities conducted in violation of a tribal–state compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). The Court observed that these types of legislative restrictions on tribal immunity were a reflection of Congress's thoughtful consideration of the various policy concerns at issue—concerns that the Court acknowledged it was ill-equipped to address. *Kiowa*, 523 U.S. at 759 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. . . . In light of these concerns, we . . . choose to defer to Congress.").

The cases described above reflect a common theme—that when it comes to Indian law, the Court historically defers to Congress's unique and exclusive role in setting federal Indian policy. Absent clear and unequivocal congressional intent, it is thus inappropriate for the Court to diminish tribal sovereignty, including by limiting the attendant doctrine of tribal immunity.

II. Congress is committed to a policy of encouraging tribal self-determination.

As the leading treatise on federal Indian law explains, "Indian law draws on disciplines as varied as anthropology, sociology, psychology, political science, economics, philosophy, and religion, [but the] most significant of these sources is history." Cohen's Handbook of Federal Indian Law, § 1.01, at 5 (2012). That is, in any federal Indian law case, the Court should view the issues within the greater historical context. In this case, it bears keeping in mind the above-described role of Congress in setting federal Indian policy, and specifically, how Congress's treatment of Indian tribes has evolved over time. While colonialism once dominated federal Indian policy, Congress has steadily and deliberately moved toward a policy of encouraging tribal self-determination.

In the years following ratification of the Constitution, Congress kept an especially close and protective grip on Indian tribes, almost separating Indians and non-Indians completely. The primary piece of Indian legislation in effect at the time was the Trade and Intercourse Acts, discussed *supra*. During this period, practically all economic activity between Indians and non-Indians was subject to federal oversight. Robert N. Clinton et al., American Indian Law 24–26 (5th ed. 2007).

After the War of 1812, the federal government moved towards a policy of relocating the Indians to accommodate for westward expansion. The original intention was initially to encourage tribes to

voluntarily move westward, often through bilateral treaties. But the process was slow, and state governments grew increasingly unsatisfied with Indians' continued presence within their borders. By the late 1820s, the situation reached a boiling point. Georgia passed a series of laws purporting to extinguish the Cherokees' title to land within the state, invalidate all Cherokee laws, and extend Georgia law to the disputed lands. Consistent with the plenary power doctrine, these laws were held unconstitutional in the case of *Worcester v. Georgia*, 31 U.S. 515, 516 (1832).

Of course, invalidation of the Georgia laws was of little practical consequence as far as removal was concerned. This was because Congress had recently passed the Removal Act of 1830, authorizing the President to negotiate with the tribes for their westward removal. Despite removal being "voluntary" in theory, tribes in fact faced great pressure to comply. Relocation brought severe hardship, as exemplified by the Cherokees' deadly journey in the Trail of Tears. Clinton et al., *supra*, at 27.

In the 1860s, policy began to shift yet again. By this point, westward settlers had leapfrogged the Indian Territory, and pressure to divest Indian lands continued to accelerate. The federal government reacted by confining tribes to smaller land bases, which became known as "reservations." Reservations were typically established by treaties negotiated by the President and ratified by the Senate. This process, however, left the House of Representatives with little input. Accordingly, in

1871, Congress passed a statute providing that the President could no longer negotiate treaties with Indian tribes. *See* 25 U.S.C. § 71. Congress's plenary power over Indian affairs thus became truly bicameral. And Congress soon began to assert this power in new and far-reaching ways, such as by passing the Major Crimes Act, discussed *supra*, thereby creating federal jurisdiction over crimes committed by Indians on Indian land.

Reservation policies were not universally favored among lawmakers. Some thought the effects of communal Indian land tenure hampered tribal economic development and that private land ownership would benefit the Indians by encouraging them to assimilate into non-Indian society. Others simply wanted reservations opened up for white settlement. These sentiments resulted in an assimilation policy implemented through the General Allotment Act of 1887, which authorized tracts of land to be assigned to individual Indian families. The allotment would be held in trust for a period of 25 years, after which the individuals would receive fee title. After the Indians within a reservation were given allotments, the surplus lands were opened up for non-Indian settlement. As the Supreme Court would later explain, "[t]he objectives of allotment were simply and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Allotment did not result in the assimilation Congress intended; rather, the most notable consequence was the severe decline in the

amount of Indian-held land. *See generally Cobell v. Norton*, 240 F.3d 1081, 1087 (D.C. Cir. 2001).

Congress eventually realized allotment was a failed policy. In an attempt to reverse its ill effects, in 1934, Congress passed the Indian Reorganization Act ("IRA"). The IRA ended future allotment of tribal lands, indefinitely extended the trust period for existing allotments, and returned unallotted lands to tribal ownership. The Secretary of the Interior was authorized to acquire additional lands to be held in trust for tribes. Additionally, the IRA authorized tribes to adopt their own Constitutions, subject to approval by the Secretary. *See* 25 U.S.C. § 461 *et seq.*

The IRA was relatively successful in restoring tribal land and promoting tribal self-governance. Unfortunately, the IRA was not well-received among many members of Congress. Though the law was never repealed, Congress took other drastic measures in an attempt to revert to assimilationist policies. Specifically, in 1953, Congress passed House Concurrent Resolution 108, formally declaring that it intended to put an end to the federal–tribal relationship, thereby terminating all federal supervision and fully subjecting tribes to state authority. *See South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 503 (1986) (discussing the "termination era").

However, termination was never completely accomplished. It was essentially carried out tribe-by-tribe, and the complexity of the process made termination a lengthy endeavor. Yet, even though

many tribes were not terminated, Congress took other steps to alter the balance of sovereignty. By enacting Public Law 280, for example, Congress exercised its plenary power over Indian affairs to vest state governments with criminal jurisdiction over on-reservation crimes as well as adjudicatory jurisdiction over private civil litigation involving Indians. *See Bryan v. Itasca County*, 426 U.S. 373 (1976). This, some have observed, was a sort of half-measure short of outright termination, in that it gave states some authority over tribes that they otherwise would not possess. Clinton et al., *supra*, at 41.

Finally in 1970, President Nixon requested that Congress formally repudiate the termination policy. He explained: "Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to . . . expressly renounce, repudiate and repeal the termination policy." *See* Larry Echohawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 Idaho L. Rev. 623, 630–31 (2004) (citation omitted).

Congress agreed with President Nixon and soon pursued a legislative agenda designed to encourage tribal self-determination, economic development, and self-sufficiency. This included passage of the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"), which allows tribes to exercise local control over federally funded governmental services, such as education,

natural resource management, and law enforcement, among others.

To this day, Congress continues to endorse a federal Indian policy of encouraging tribal self-determination. This is demonstrated by congressional support of the use of tribal forums to settle disputes—including disputes with non-Indians. One of the more prominent federal statutes that exemplify this policy is the Indian Child Welfare Act ("ICWA"), which essentially protects the exercise of tribal jurisdiction over child custody cases involving Indian children. But the federal policy goes far beyond child custody proceedings. Indeed, the support of tribal dispute resolution systems is trans-substantive. Congress routinely dedicates funds to support tribal justice systems, finding that they are "appropriate forums for the adjudication of disputes affecting personal and property rights." *See* 25 U.S.C. § 3601(6).

So after over two hundred years of evolving federal Indian policy, it has become settled that the overriding congressional goal in the area of Indian affairs is to protect tribal self-government and encourage tribal self-determination. It is this backdrop of federal Indian policy against which this case presents itself.

III. Suits against tribal employees for actions taken in their official capacity—which are not authorized by Congress—undermine the congressional policy of encouraging tribal self-determination, and should not be permitted.

As was stated in Respondent's brief, Petitioners' claims are barred by both sovereign immunity and official immunity. The Tribe's sovereign immunity bars Petitioners' claims because the Tribe is clearly the real party in interest in this case, as any judgment against Respondent would "inevitably" be paid by the Tribe. *See Edelman v. Jordan*, 415 U.S. 651, 665 (1974). Alternatively, *official* immunity also bars Petitioners' claims, because federal common law affords absolute immunity to state tort liability to tribal employees acting within the scope of their official duties. *See Barr v. Matteo*, 360 U.S. 564, 571 (1959). The Court may resolve this case under either theory, as the decision below clearly blended the two concepts together.

To elaborate on those points, Petitioners' suit should be barred because it would severely undermine the explicitly pronounced congressional objective of encouraging tribal self-determination. As set forth above, federal Indian law issues are the domain of Congress, and Congress has long been committed to a policy of encouraging tribal self-determination—including through the tribal gaming industry and the use of tribal dispute resolution. To allow Petitioners' suit to go forward in the Connecticut Superior Court would unduly and severely infringe upon the Mohegan Tribe's sovereignty and hamper its efforts (and the efforts of all tribes, including the *amici*) to achieve true self-determination.

A. Petitioners' suit, brought in Connecticut state court, interferes with the Tribe's self-determination.

This case directly implicates the Tribe's self-determination efforts. It centers on the operation of an economic arm of the Tribe that was specifically created to further tribal self-sufficiency. Resolution of the issue of whether an employee of that entity is subject to suit for actions taken in his official capacity will have profound consequences for the Tribe, the *amici*, and all of Indian country.

Respondent William Clarke is a limousine driver who was transporting patrons of the Tribe's Mohegan Sun Casino to their homes when he collided with Petitioners' vehicle. At the time, he was acting in his capacity as an employee of the Mohegan Tribal Gaming Authority ("MTGA"), an independent tribal regulatory agency created pursuant to the Tribe's Constitution, which exercises powers and authorities delegated to it by the Tribal Council, the Tribe's governing body. *See* Mohegan Const., Art. XIII, § 1. The MTGA oversees all aspects of "the development, construction, operation, promotion, financing, regulation and licensing" of the Tribe's gaming activities. *Id.*

The Tribe has also established a remedial forum for individuals allegedly injured by Casino employees. Mohegan Tribal Code, § 3-248(a). This remedial forum—the Mohegan Gaming Disputes Court—is an integral component of the Tribe's gaming operation. It fulfills an essential role under the tribal–state compact between the Tribe and the

State of Connecticut,[5] as the Compact provides that the Tribe must establish "reasonable procedures for the disposition of tort claims" and that the remedial system must be "analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate . . . ." Tribal–State Compact, § 3(g), *available at* https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026002.pdf

The court is governed by a set of laws duly enacted by the Tribe—laws designed to facilitate the fair and equitable resolution of patrons' complaints. Those laws are generally modeled on Connecticut law. For example, like Connecticut, the Tribe does not allow suits against its government employees; instead, the MTGA is substituted as a defendant. Mohegan Tribal Code § 3-131. Limitations on recovery are also akin to the limitations imposed by state governments, such as the prohibition on awards of punitive damages.

Given its role in the tribal–state compact and the importance of resolving patrons' disputes generally, the status of the Mohegan Gaming Disputes Court as the exclusive venue for patrons' complaints is inextricably tied to the success of the underlying gaming business. Gaming, of course, is vital to tribal economic development—not just for the Mohegan Tribe, but for tribes nationwide. It is also a form of economic development that has been

---

[5] Under the IGRA, in order to offer "Class III" gaming, a tribe must enter into a compact with the State in which it is located. 25 U.S.C. § 2710(d)(1)(C).

emphatically supported by Congress. As the findings in the IGRA explain, "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4).

These goals would be severely undermined if the Petitioners' suit is allowed to move forward in Connecticut Superior Court. The Tribe has taken deliberate measures to negotiate a compact with the State of Connecticut, and Petitioners' suit threatens to make aspects of the Compact a total nullity. There would be essentially no point in the Tribe and the State negotiating for a dispute resolution process if patrons could simply bypass these legal processes take their tort claims to the state courthouse.

Furthermore, aside from the gaming implications, circumventing tribal immunity through mere pleading maneuvers creates a significant threat to the Tribe's ability to self-govern. It would be difficult to attract and retain well-trained and competent employees if those employees were constantly at risk of becoming subject to frivolous lawsuits. Public service to tribes should be encouraged, yet Petitioners' theory of the case would create a great disincentive for talented individuals that might otherwise wish to work for tribes.

Hence, in the absence of express congressional authorization, this Court should flatly reject Petitioners' argument. Indeed, as set forth *supra*, the Court has repeatedly recognized that tribal sovereignty—and the attendant doctrine of tribal immunity—should not be diminished unless

Congress unequivocally says so. This principle is grounded in two centuries of case law, spanning subject areas such as treaty rights, reservation boundaries, and of course, immunity.

B. Whether analyzed as "sovereign" immunity or "official" immunity, Congress has not authorized this suit.

The Court can resolve this case by holding that Respondent is protected by either "sovereign" immunity or "official" immunity. Under either theory, the outcome is the same, as Congress has exercised its plenary power over Indian affairs "conservatively," only limiting the scope of tribal immunity "in a few specific contexts," none of which apply in this case. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 717 (2002).

1. Congress has not abrogated tribal sovereign immunity so as to allow Petitioners' suit to proceed.

This case should be viewed as presenting an issue of sovereign immunity, as the Tribe is clearly the real party in interest. Any judgment against Respondent will not be paid out of Respondent's own assets, but rather out of the assets of the sovereign Tribe. Because such a lawsuit has not been authorized by Congress, it is barred by the Tribe's sovereign immunity. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014) ("[I]t is

fundamentally Congress's job, not [the Court's], to determine whether or how to limit tribal immunity.").

Indeed, Congress has consistently refused to abrogate the doctrine of tribal sovereign immunity. This decision is not a byproduct of ignorance or legislative disinterest. In fact, far from being indifferent to the issue, Congress has repeatedly—and deliberately—chosen to preserve tribal sovereign immunity.

For example, when creating a financial assistance program under the ISDEAA, to remove any doubt as to whether the program affected tribal sovereign immunity, Congress specifically provided that no part of the program "shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 5332(1). As this provision makes clear, Congress is mindful of the doctrine of tribal sovereign immunity, has decided that it serves an important function in tribal government, and has therefore opted to keep it in place.

To be sure, Congress has on multiple occasions exercised its plenary authority to enact legislation abrogating or placing limitations on sovereign immunity. The practice extends all the way back to 1891, when Congress enacted the Indian Depredation Act. 26 Stat. 851–54 (1891). The Act created a remedial mechanism for victims of "wrongs" committed by Indians such that they could receive compensation for "property . . . taken or

destroyed by Indians belonging to any band, tribe, or nation in amity with the United States." *See United States v. Gorman*, 165 U.S. 316, 320 (1897). However, tribal liability under the Act was extremely limited; tribes would only be liable to the extent the judgment could be paid from annuities or other federal payments owed to the tribe. Otherwise, the United States would be responsible for the judgment. *Id.* at 319. As the provisions in the Act make clear, even in the early years of federal Indian policy, Congress has been careful to preserve tribal immunity so as to protect the tribal treasury, and in turn, tribal self-government.

In 1968, Congress enacted another limited abrogation of tribal immunity, this time in the Indian Civil Rights Act ("ICRA"). The ICRA imposed upon tribes a set of civil rights standards similar (though not identical) to those in the Bill of Rights. 25 U.S.C. § 1302. However, the ICRA included only a narrow abrogation of sovereign immunity, designed for cases brought by petition for habeas corpus. § 1303. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court flatly refused to infer a broader abrogation of immunity. The Court reasoned that "Congress's failure to provide remedies other than habeas corpus was a deliberate one," and it would be improper to find an implied waiver of immunity for non-habeas cases. *Id.* at 61, 70–72.

More recently, in 2000, Congress enacted the Indian Tribal Economic Development and Contracts Encouragement Act, thereby limiting tribes' ability to raise sovereign immunity in contractual agreements. Pub. L. 106-179, codified at 25 U.S.C. §

81. This legislation prohibited tribes from entering into contracts that "encumber Indian lands for a period of 7 or more years" unless specifically approved by the Secretary of the Interior. § 81(b). Approval would be withheld if the contract at issue failed to include an express waiver of sovereign immunity. § 81(d)(2). As the terms of this legislation show, its scope is significantly limited—applying only to contracts encumbering land for seven or more years. Like the other statutes, this legislation indicates a careful deliberation on Congress's part. It reflects Congress's judgment that the development of tribal lands would benefit by a federal requirement that certain land-related contracts include an express waiver of sovereign immunity.

More noteworthy to the case at hand, Congress has in fact abrogated sovereign immunity for gaming-related disputes—but only for a certain category of these disputes. Specifically, Congress has statutorily abrogated sovereign immunity to permit "any cause of action [in federal district court] initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). This narrow provision is the sole abrogation of sovereign immunity under the IGRA, and the Court has given that provision an appropriately strict construction. *See Bay Mills*, 134 S. Ct. at 2032. The statute includes no broader provision to allow other suits against tribes or their employees, such as tort claims brought against casino employees, and the Court has refused to infer what is not there.

Yet, though Congress has enacted a variety of statutes carefully modifying tribal sovereign immunity, Congress has *never* enacted any generalized abrogation of the doctrine. This has not been an oversight, as Congress has repeatedly considered, and rejected, such legislation. For example, in 1998, in the 105th Congress, Senator Slade Gorton (R-WA) introduced S. 1691, the "American Indian Equal Justice Act." The bill proposed to eviscerate tribal sovereign immunity, allowing claims to be brought against tribes in federal or state court with respect to torts, contracts, or other federal or state causes of action. However, S. 1691, and other similar bills introduced by Senator Gorton, though thoroughly debated, were never enacted by Congress. Seielstad, 37 Tulsa L. Rev. at 726–29 (2002).

Accordingly, because the Tribe is the real party in interest in this case, Petitioners' claims are barred by sovereign immunity, and because Congress has not taken any action to abrogate sovereign immunity, the Court should affirm.

2. **Congress has not altered the *Barr* rule of absolute official immunity against state tort liability, a rule that applies to tribal officials.**

Even if this case is viewed as presenting an issue of "official" immunity, the outcome should be the same. Just as Congress has decided to leave tribal *sovereign* immunity intact (with a few narrow statutory exceptions), Congress has likewise refused to diminish the doctrine of *official* immunity. The federal common law rule of official immunity

therefore controls, and that rule provides tribal employees with absolute immunity against state-law tort claims.

As explained in Respondent's brief, *Barr v. Matteo*, 360 U.S. 564 (1959), supplies the proper federal common law rule regarding the scope of official immunity. Under *Barr*, government employees receive absolute immunity against state-law tort claims, regardless of whether they hold an "exalted office," so long as their actions were taken "within the outer perimeter of [their] line of duty." *Id.* at 572, 575. The Court reasoned that such suits "would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* at 571.

This Court retreated from *Barr* in the case of *Westfall v. Erwin*, 484 U.S. 292 (1988). In that case, the Court held that absolute immunity against state-tort liability required a finding that the government employee's alleged tortious conduct be discretionary in nature. *Id.* at 296–97. In so holding, however, the Court noted that official immunity is an area of law in which "Congress is in the best position to provide guidance." *Id.* at 300. And, in fact, Congress soon *did* provide that guidance.

Congress responded to *Westfall* immediately, enacting the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. 100-694 (1988), now known as the Westfall Act. The Westfall Act "delete[d] the 'discretionary function' requirement,

finding it an unwarranted judicial imposition." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995). The Westfall Act thereby restored the federal common law rule of official immunity previously recognized under *Barr*.

Westfall has thus become discredited by virtue of the Westfall Act. Congress made it clear that it did not approve of the reasoning in *Westfall* (which was comprised mainly of the Court's ad hoc balancing of various empirical factors), and it would be a grave mistake for the Court to revert to that reasoning. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 68 (1996) (finding that *Chisholm v. Georgia*, 2 U.S. 419 (1793), became "discredited" upon ratification of the Eleventh Amendment). Accordingly, the *Westfall* decision does not govern the scope of tribal official immunity against state-law tort claims; *Barr* does.

Absolute immunity against state-law tort claims is thus the appropriate federal common law rule regarding claims brought against tribal officials. Of course, Congress could exercise its plenary power in Indian affairs to alter this rule, but it has thus far opted not to do so. Indeed, just as Congress has declined to diminish tribal *sovereign* immunity, so too has Congress refused to diminish tribal *official* immunity.

Both breeds of tribal immunity (sovereign and official) are rules of federal common law. Congress has plenary power to alter these rules so as to allow a suit like Petitioners' to proceed in state court. But Congress has deliberately refused to exercise its

plenary power in such a manner. Because it is Congress's role—not the Court's—to determine whether and how to diminish tribal immunity, the Court should affirm. *Bay Mills*, 134 S. Ct. at 2037.

CONCLUSION

The judgment of the Connecticut Supreme Court should be affirmed.

Respectfully Submitted,

RICHARD VERRI
Counsel of Record
BRETT STAVIN
SABA BAZZAZIEH
ROSETTE, LLP
1100 H. STREET, NW
SUITE 400
WASHINGTON, DC 20005
(202) 652-0579
rverri@rosettelaw.com

Counsel for Amici Curiae